Nos. [illegible], et al. and [illegible], et al.

In The
Supreme Court of the United States
October Term, 1990

The Berkshire Gas Co., *et al.*,
Petitioners,
v.
Associated Gas Distributors,
Respondent.

Panhandle Eastern Pipe Line Co., *et al.*,
Petitioners,
v.
Columbia Gas Transmission Corp.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GROUP IN OPPOSITION

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STATEMENT

Respondents the Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Group respectfully request that this Court deny the Petitions for Writs of Certiorari sought herein to review the judgments and opinions of the United States

Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied en banc*, 898 F.2d 809 (1990) ("AGD"), and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1989) ("*Columbia*").

Both cases involve the use of direct billing mechanisms keyed to customers' past purchases of natural gas. The court of appeals correctly found that these mechanisms violate the statutory prohibitions known collectively as the filed rate doctrine and the rule against retroactive ratemaking.

We join in the August 31, 1990 Briefs of Respondents in Opposition in both cases and, for the sake of brevity, adopt the Questions Presented and the Statements contained therein.

REASONS FOR DENYING THE WRIT

During the past few years, this Court has seen a spate of certiorari petitions arising out of decisions involving the Federal Energy Regulatory Commission's ("FERC") regulation of the natural gas industry. Due to the extraordinary diversity of interests among the myriad parties interested in natural gas matters (and the large amounts of money typically involved), it is perhaps not surprising that frequently, in cases having industrywide effect, *some*one (including FERC itself) will feel strongly enough about an issue to seek review by this Court. Yet, as passionate as a petitioner in any such case may feel about "its issue," few such issues actually rise to certiorari standards.

High passions notwithstanding, the instant FERC cases too fail to warrant certiorari. In fact, they present two examples of a classic, but entirely ordinary, administrative situation: an agency **earnestly** wished to achieve certain policy goals, but it sought to do so through means clearly outside its statutory authority. On review, the court of appeals twice applied well-settled law that, no matter how

well-intentioned the agency's objectives might be, it lacked authority to increase rates *after the fact* for gas already sold. To do so, the D.C. Circuit held, was in clear violation of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d (1988) (the "Act"). Thus rejecting FERC's verbal somersaults purporting to show the prospective allocation of the gas costs involved, the court of appeals correctly concluded that FERC's orders in fact *raise rates for past purchases and do not merely use historic purchase data as a basis for setting prospective rates.*

The decisions below are neither novel nor expansive (*contra* FERC 89-1988 Pet. at 27); rather, they are supported by numerous decisions of this Court applying the filed rate doctrine and its companion rule against retroactive ratemaking. Allowing the D.C. Circuit's decisions to stand will not have the dire consequences FERC and other Petitioners suggest; rather as in most cases, alternative administrative remedies—that *are within* FERC's legal authority—*do* exist and may be pursued on remand.

Finally, the petitions' extended discussion and repeated emphasis of the policy rationale underlying FERC's orders seem to reflect the same common regulatory error recognized by the D.C. Circuit: the agency confuses (a) that which it believes it *should* do as a matter of policy with (b) that which it actually *can* do as a matter of law. Where the former conflicts with the latter, the latter must control; it is up to the Congress—not the agency nor the courts—to remedy the matter. *See generally Maislin Industries U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2579, 2770 (1990).

Accordingly, the decisions below do not warrant the exercise of certiorari jurisdiction.

I. THE D.C. CIRCUIT CORRECTLY APPLIED WELL SETTLED STATUTORY AND DECISIONAL LAW THAT PUBLIC RATE PREDICTABILITY LIES AT THE HEART OF THE NATURAL GAS ACT'S CONSUMER PROTECTION PURPOSES.

This Court has long recognized that the Natural Gas Act was designed to "protect the consumer interests against exploitation at the hands of private natural gas companies," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944), affording "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Comm'n of New York*, 360 U.S. 378, 388 (1959). It is likewise well settled both that a regulated natural gas company's charges for jurisdictional service are governed solely by its filed rates and that "the Commission itself has no power to alter a rate retroactively." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). The decisions below are wholly consistent with both this Court's interpretation of the Act generally and its rulings on the filed rate doctrine specifically.

There is nothing "novel and expansive" (FERC 89-1988 Pet. at 27) about the D.C. Circuit's view that the filed rate doctrine is intended to protect consumers by insuring rate predictability.[1] Indeed, the filed rate doctrine is the direct product of Sections 4(c) and 4(d) of the

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[1] Despite its claims here, FERC has itself properly observed elsewhere that one of the "policy bases" of the filed rate doctrine is "the need for certainty as to the rates and other terms governing a regulated transaction." *Arkansas Louisiana Gas Co. v. Hall*, 13 FERC ¶ 61,100 at 61,212 (1980), *rev'd sub nom. Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) (reversed for abuse of discretion in denying waiver of notice under Section 4(d) of the Act to give effect to contractually authorized rates), *cert. denied*, 464 U.S. 822 (1983).

Act, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 576-77, and rate predictability for the public lies at the heart of those provisions. Section 4(c) requires "public" posting of all rates and charges for any service subject to FERC's jurisdiction. 15 U.S.C. § 717c(c). Section 4(d) requires 30 days' notice to FERC "and to the public" of any rate changes and requires companies to state "plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." 15 U.S.C. § 717c(d). Advance public notice of changes in filed rates is both pointless and worthless unless consumers can rely on those published rates and make their purchasing decisions accordingly.

In the face of these consumer protection purposes, FERC suggests implausibly that Section 4 is instead intended to serve primarily the purpose of making **the agency itself** aware of rate increases and preserving its primary jurisdiction. It does not, however, require plenary Supreme Court review to confirm that FERC's suggestion ignores both the express language of the Act and the consumer interests it was "plainly designed" to protect. *FPC v. Hope Natural Gas Co.*, 320 U.S. at 612.

Congress quite deliberately balanced the interests of consumers and regulated pipelines in Sections 4 and 5 of the Act. Section 4 protects consumers from retroactive increases in filed rates; at the same time, Section 5 protects pipelines from having to make retroactive refunds when previously approved rates are found to be no longer just and reasonable. The decisions below correctly maintain this balance and reject FERC's strained view of Section 4, which would have allowed pipelines to increase their rates retroactively for gas their customers have *already* bought. *See AGD*, 898 F.2d at 810 (Williams, J. concurring).

Predictability of filed rates is an essential component of the Act's consumer protection objectives. As in any consumer decision, consumers' gas purchase decisions are

based in part on the rate they face, *i.e.*, how much their utility bill will be. This is especially so for price-sensitive industrial and large commercial consumers, who typically make their energy purchase decisions based on the cost of a *variety* of competing sources, including gas from numerous non-utility suppliers, oil, propane, and other fuels. Price differentials of as little as a penny influence these consumers' choices among potential suppliers.[2] If a consumer cannot rely on the continued effectiveness of the currently filed rates—*i.e.*, if he is exposed to *post hoc* increases in the rates charged for gas he has *already* purchased—then rational purchasing and business planning become impossible. Pipelines' filed rates not only determine the consumer's choice of suppliers and transportation routes, but also affect both (1) the prices offered by other energy sellers and (2) the discounts offered by competing gas pipelines and local utilities trying to market their sales and transportation services. Though FERC seems to scoff at the need for rate certainty with respect to gas already purchased (*e.g.*, FERC 89-1988 Pet. at 24), such certainty is fundamental to rational economic decisionmaking. By opening the Pandora's box of retroactive ratemaking here, FERC has encouraged rate gamesmanship among pipelines and has substituted commercial chaos for the rate predictability inherent in the Act's public tariff filing requirements.

The Acting Solicitor General's assertion that it is "unrealistic" to assume that clear purchasing choices always exist (FERC 89-1988 Pet. at 24) is belied by FERC's own clear policy specifically to maximize and encourage such choices. Indeed, in its Order 436, FERC termed open access transportation—which allows consumers the freedom to choose their suppliers and make their own purchasing decisions—the "cornerstone" of its

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[2] Similarly, pipelines' wholsesale customers—typically local gas utilities—make monthly (and sometimes daily) decisions about their own purchases, since gas is often available from a number of different suppliers at varying prices.

program.[3] To provide consumers with clear purchasing choices is one of FERC's acknowledged policy objectives.[4] For the agency now to allow counsel to suggest to this Court that these objectives are "unrealistic" is to engage in self-fulfilling prophecy: that is, by seeking to erode the filed rate doctrine, FERC may well undermine its own most important policies and defeat the rate certainty so essential to market choice.

Key to the decisions below was the D.C. Circuit's recognition that, notwithstanding FERC's tortured arguments to the contrary, the rate changes approved in FERC's orders were indeed retroactive in application and effect:

> As in *Columbia Gas*, "the effect of [these orders] is quite clear: downstream purchasers [such as petitioners here] are expected to pay a surcharge, over and above the rates on file at the time of sale, *for gas they had already purchased.*"

AGD, 893 F.2d at 355-56 (emphasis added), quoting *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140, (D.C. Cir. 1987).

FERC's petition in *AGD* still steadfastly maintains that that it did not retroactively substitute higher rates

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[3] Order 436, FERC Statutes and Regulations [1982-1985] ¶ 30,665 at 31,494 (1985), *vacated on other grounds, Associated Gas Distributors v. FERC,* 824 F.2d 981 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988). *See also Associated Gas Distributors v. FERC,* 824 F.2d at 994-96.

[4] "[O]ur current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition. The goal of this policy is to provide incentives and opportunities that allow all shippers, industrial end users as well as LDCs and other parties, to benefit by access to commodity and transportation markets . . . . The policy . . . promotes market participation by larger numbers of players, thus providing new supply options and leverage to parties seeking efficiently priced services." *Northwest Pipeline Corp.,* 52 FERC ¶ 61,053 (July 18, 1990), slip op. at 8 (footnotes omitted).

for the ones previously on file, that it merely allocated "current" costs among customers "on the basis of" the amounts of gas they did not purchase during a past period. (FERC 89-1988 Pet. at 22).[5] But, despite this semantic legerdemain, it is clear that the rates imposed in *AGD* are indeed retroactive in the common, ordinary sense that Congress no doubt envisioned. Customers who purchased gas from Tennessee Gas Pipeline Company ("Tennessee") at publicly filed tariff rates during the 1983-1986 "deficiency period" are now required to pay substantially more for *that* gas; the higher rates are decidedly *not* for the gas they currently purchase. These customers have no means whatsoever to avoid these *post hoc* charges based on any purchasing decision they can make now. As the D.C. Circuit explained, this is "virtually indistinguishable from the Commission substituting in 1988 a new rate schedule for gas purchased in 1983-1986." *See AGD*, 898 F.2d at 810 (Williams, J., concurring).

Nowhere is this more clear than in the case of customers who no longer buy any gas from the pipeline. Under the retroactive rate surcharge method approved in FERC's orders below, even pipeline customers with expired contracts are held accountable for added payments long after they have ceased purchasing any gas—and even after FERC has approved abandonment.[6]

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[5] Because the resulting rates were filed in public tariffs, FERC and its supporters argue that the agency satisfied the literal requirements of Sections 4 and 5 of the Act. Yet, in that limited sense, *any* new charge must obviously be billed and collected "prospectively"—the laws of time and physics preclude literal retroactivity.

Thus, if petitioners' argument were due any weight, it would simply eliminate all filed rate protection from the statute.

[6] *See, e.g., United Gas Pipe Line Co.*, 47 FERC ¶ 61,163 (1989); *Transcontinental Gas Pipe Line Corp.*, 46 FERC ¶ 61,343 (1989); *Trunkline Gas Co.*, 45 FERC ¶ 61,429 at 62,361-62 (1988), *appeal docketed sub nom. Michigan Consolidated Gas Co. v. FERC*, No. 88-1904 (D.C. Cir., Dec. 23, 1988). In *United*, FERC imposed the

The most dramatic examples of the real, not theoretical, retroactivity of these assessments—and the mischief that FERC could cause if its interpretation of the statute were upheld—occur on pipelines other than Tennessee that also use the purchase deficiency methodology to pass through costs to their customers.[7] For example, application of that methodology on the South Georgia Natural Gas Company system imposes costs on customers far in excess of any "current" measure of the cost of natural gas service. One such customer, the City of Andersonville, Georgia, is a town of 300 inhabitants with 83 retail gas customers. It was to be assessed $1.7 million in take-or-pay costs for gas not purchased during the "deficiency" period due to the town's loss of a major industrial gas purchaser to alternative fuels. This amounted to a staggering potential charge of over $20,000 per customer in a locality where the average annual income is less than $10,000. Based on the town's annual consumption at the time the charge was to have been imposed, the resulting surcharge would be over $480 per Mcf of gas purchased.[8] Even if FERC ultimately chooses to grant the town's long-pending request for hardship relief, it is ludicrous for the agency to pretend that these new charges are for "current" gas service.[9] They are

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added costs by taking the extraordinary step of amending an earlier order which had granted abandonment of service to the customer.

[7] The comparision to other pipelines is legitimate, since it was the purchase deficiency allocation *methodology* itself that the D.C. Circuit found to violate the filed rate doctrine, not simply Tennessee's own particular implementation of it. 893 F.2d at 362. Even FERC acknowledges the impact of the court's decision on cases involving other pipelines, as well as on its generic Order Nos. 500-H and 500-I. (FERC 89-1988 Pet. at 17-18).

[8] *See* Affidavit of Mr. Jerry Hargrove, City Clerk of the City of Andersonville, Georgia filed on July 20, 1989, in *South Georgia Natural Gas Co.*, FERC Docket No. RP88-267-008, *et al.*

[9] Abandonments and other changes in pipeline markets also illustrate how these charges are indeed retroactive in any recognizable sense. For example, two of Tennessee's customers, Colum-

clearly a *post hoc* retroactive surcharge on gas previously purchased and long since consumed.

II. FERC'S DEFICIENCY-BASED METHODOLOGY IS NOT MERELY AN EXERCISE IN COST ALLOCATION.

Also unworthy of the Court's attention is FERC's argument that the issue here is simply one of cost allocation—*i.e.*, a matter of FERC determining just and reasonable rates consistent with the "broader regulatory principle" of matching rates with responsibility for the underlying costs. (FERC 89-1988 Pet. at 23). Neither in *AGD* nor elsewhere has FERC demonstrated any relationship between a customer's **past** purchases and the costs at issue, **one-half** of which costs are attributable in Tennessee's case to relief from **future** contract obligations and take-or-pay charges. Order 500-H, FERC Statutes and Regulations III, ¶ 30,867 at 31,522 (1989), *aff'd, American Gas Association v. FERC*, —— F.2d —— (August 24, 1990). But, even if there were such a connection, the Act contains no exemption to the requirements of Sections 4 and 5. FERC is not permitted to pursue regulatory principles through means which are at war with statutory principles; it cannot lawfully attempt to match cost responsibility through retroactive rates. Stated differently, the latitude traditionally allowed FERC in cost allocation matters is not so wide as to encompass its approval of illegal rates, *i.e.*, retroactive rates which it has no authority to implement.[10]

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bia Gas Transmission Corporation and Inland Gas Company, were ordered to make payments based on contractual purchase levels formally abandoned months before the pipeline filed to recover these costs and two years before FERC issued its order approving the charges. *Tennessee Gas Pipeline Co.*, 42 FERC ¶ 61,175 at 61,634 (1988). Corning Natural Gas Corporation was assessed charges attributable to its expired contract with its pipeline, even after it had left that pipeline system. *See North Penn Gas Co.*, 48 FERC ¶ 61,196 (1989).

[10] Moreover, attaching a "cost allocation" label to this issue would not be dispositive. *See generally Arkansas Louisiana Gas*

In *Maislin Industries, U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2759 (1990), this Court rejected a similar attempt by the Interstate Commerce Commission to override the filed rate doctrine by labelling a carrier's conduct a violation of the statutory ban against unreasonable practices. "Stripped of its semantic cover [the Commission's policy and interpretation] thus stand revealed as flatly inconsistent with the statutory scheme as a whole." Slip op. at 13. Similarly, the court of appeals here correctly rejected FERC's efforts to bootstrap its authority to set just and reasonable rates into a license to disregard the filed rate doctrine and set illegal rates.

III. FERC'S AUTHORITY IN SECTION 4 TO WAIVE NOTICE DOES NOT GIVE IT AUTHORITY TO CHANGE RATES RETROACTIVELY.

Petitioners concede the retroactive effect of the rates in *Columbia*, but they read the Act to permit pipelines nevertheless to impose such rates so long as FERC waives the statutory notice period. This reading transmogrifies Section 4's specific permission to shorten the 30-day advance notice into broad authority to increase rates for gas sold many years in the past—*i.e.*, it simply negates the filed rate doctrine. But it is impossible to conceive how Congress could have intended to give pipelines greater power to impose retroactive rates (upon a general showing of "good cause" under Section 4) than it granted FERC itself under Section 5 (to change rates only on a prospective basis and only after a specific finding that rates are unjust and unreasonable).

The Acting Solicitor General's suggestion that FERC's current view of its Section 4 waiver power dates from the late 1930s (FERC 89-2001 Pet. at 14-15 n. 10) is misleading and irrelevant. Whatever FERC's 1939

Co. v. Hall, 453 U.S. at 579, where the retroactivity of the rate increase could not be disregarded simply because it was characterized as an award of damages by the Louisiana Supreme Court.

regulation may have meant, there is no indication that FERC **ever** used it to impose retroactive rates without the express agreement of the parties involved. It has apparently never been tested by any court. More significantly, FERC itself has only very recently interpreted the statute to give it the authority the Acting Solicitor General now claims has long been evidenced by its regulations. In fact, as recently as 1986, in *City of Girard, Kansas v. FERC*, 790 F.2d 919, 923 (D.C. Cir. 1986), FERC argued that it had "no power" under the governing statute to order an effective date prior to the filing date of the rate change.[11]

CONCLUSION

It would be fundamentally inconsistent with the underlying purpose of regulation under the Natural Gas Act—*i.e.*, to insure that pipeline monopolies function like competitive markets to the extent feasible—to permit after-the-fact adjustment of posted prices. In no competitive market do merchants have the right to increase the price for goods sold after the customer has left the store. When a customer buys a shirt at the ticketed price, the store cannot later collect more from that customer on grounds that it discovered additional, unrecovered costs.[12]

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[11] Although *City of Girard* was decided under the Federal Power Act, that statute is "in all material respects substantially identical" to the Natural Gas Act. *FPC v. Sierra Pacific Power Co.*, 350 U.S. at 353. *See also Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985), in which FERC made no effort to claim that the provisions of the regulations cited here authorize it to permit rates to become effective before the date they were filed.

[12] "The wholesale purchasers . . . cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, . . . but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established 'filed rate' doctrine . . . ." *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (citations omitted).

The D.C. Circuit properly restrained FERC's abuse of its Natural Gas Act power—which is limited to setting rates only for services to be purchased subsequently. Its decisions are consistent with the language and intent of the Natural Gas Act and with this Court's prior decisions.

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

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